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No. 94-437

In The

Supreme Court of the United States

October Term, 1994

BREAUX BROTHERS FARMS, INC., TECHE PLANTING, INC. and FRANCIS "PAT" ACCARDO,

Petitioners,

versus

TECHE SUGAR COMPANY and SOUTH COAST SUGARS, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit properly applied the standards of *Jefferson Parish Hospital District No. 2 v. Hyde* and concluded that, if characterized as a tying arrangement, the proposed contract challenged by Petitioners had no antitrust significance.

2. Whether the proposed contract of which Petitioners complained would properly be characterized as a tying arrangement.

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents Teche Sugar Company and South Coast Sugars, Inc. (referred to jointly as "South Coast")[1] owned two sugar mills in south Louisiana. South Coast faced stiff competition from other mills, particularly local cooperatives which had long-term contracts with their farmer

[1] Each of the Respondents is owned by South Louisiana Sugars, Inc., which is a wholly owned subsidiary of South Coast Investment Company. Neither of the Respondents has any non-wholly owned subsidiaries.

members. In order to ensure a supply of cane for their mills, Respondents leased a portion of the Oaklawn Plantation where cane was grown. Respondents offered to sublease the land to Petitioners Breaux Brothers Farms, Inc., Teche Planting, Inc., and Francis "Pat" Accardo. Petitioners had previously leased portions of the Oaklawn Plantation themselves, and were offered the subleases when their original leases expired.

The Agricultural Agreement and Sublease South Coast proposed to Petitioners contained a "mill designation clause" pursuant to which South Coast, as one of the owners of the sugar cane crop to be produced on the property, was given the sole right to determine the mill to which the sugar cane crop would be sent for processing. Breaux Brothers elected to sign the Agricultural Agreement and Sublease; Teche Planting and Accardo did not.

Petitioners initially filed suit in Louisiana state court, alleging that the Agricultural Agreement and Sublease violated the Louisiana antitrust laws. Their claims were rejected by the state court and the suit was dismissed.

Petitioners then filed suit in the United States District Court for the Western District of Louisiana, again complaining that the contract for growing sugar cane on the Oaklawn Plantation constituted a "tying agreement" which violated the Sherman Act.[2] The lawsuit was financed by a farmers' group known as the St. Mary Growers Association. After a bench trial, the district

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[2] The suit also asserted certain claims arising under state law with respect to the termination of the prior lease. Those claims are not in issue before this Court.

court found in favor of Petitioners, awarding them $45,569.49 in antitrust damages and $184,747.00 in attorneys' fees. *Breaux Brothers Farms, Inc. v. Teche Sugar Co.*, 792 F. Supp. 1436, 1459 (W.D. La. 1992). South Coast perfected an appeal to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit held that South Coast was entitled to judgment as a matter of law. The record revealed that even in the most narrowly drawn geographic market – St. Mary's Parish, Louisiana – South Coast controlled only 17.5% of the sugar cane farmland. Expanding the market to include a part of Iberia Parish left South Coast with only 9.4% of the market. Assuming without deciding that the contract was a tying arrangement, the Fifth Circuit held that South Coast's insignificant share of the market for the alleged tying product (sugar cane farmland) meant that as a matter of law there was no *per se* violation of the Sherman Act. Although under the analysis suggested by many courts the absence of such market power would also preclude a finding that the contract was an unreasonable restraint of trade, the Fifth Circuit went on to review the record carefully and determine that there was no evidence of an adverse impact on competition in the market for the tied product (mill grinding services). Accordingly, the court concluded that South Coast was entitled to judgment as a matter of law on Petitioners' tying claim and reversed the judgment of the trial court. *Breaux Brothers, Inc. v. Teche Sugar Co.*, 21 F.3d 83, 89 (5th Cir. 1994).

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied. This Court's decision in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), clearly established the criteria upon which a tying case is to be analyzed. The Fifth Circuit decided this case using those criteria. The pre-*Jefferson Parish* cases Petitioners cite do not present an unresolved split in circuit court authority.

Under the *Jefferson Parish* standards, a party with a 9-17% market share cannot be guilty of a *per se* violation of the Sherman Act in a tying case. Four members of this Court concluded in *Jefferson Parish* that the fact of low market share alone ends the inquiry into a tying violation (and several circuit courts have subsequently so held). The majority in *Jefferson Parish* analyzed the record for any evidence that the tie adversely impacted competition in the market for the tied product.

Following *Jefferson Parish* in this case, the Fifth Circuit concluded that there was no *per se* violation of the Sherman Act because of South Coast's low market share. The court then examined the record for evidence of an adverse impact on competition in the market for the tied product; there was none. Thus it found, also in accordance with *Jefferson Parish*, that there was no violation of the Sherman Act.[3]

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[3] The Fifth Circuit found it unnecessary to address the issue of whether the Agricultural Agreement and Sublease actually constituted a "tying arrangement" and the fact that there was no evidence in the record of any impact on interstate commerce. These are, however, independent bases upon which the Fifth Circuit's decision correctly decided this case.

I.

THE APPLICATION SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT PROPERLY APPLIED THE STANDARDS OF *JEFFERSON PARISH* AND CONCLUDED THAT, IF CHARACTERIZED AS A TYING ARRANGEMENT, THE TRANSACTION QUESTIONED BY PETITIONERS HAD NO ANTITRUST SIGNIFICANCE AS A MATTER OF LAW

The Fifth Circuit opinion reflects that it carefully analyzed the record presented to the trial court and properly applied the standards this Court has articulated.

A. There Could Be No *Per Se* Violation Of The Sherman Act Under The Trial Court's Findings.

The Fifth Circuit accepted the trial court's constricted definition of the relevant geographic market,[4] and its finding that ownership of two farms in that market accounted for "between a nine and seventeen percent" share of the relevant market for sugar cane land.[5] Applying the standards of *Jefferson Parish*, the court then easily

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[4] The trial court found that the "relevant geographic market" was governed by the location of the Oaklawn Plantation and consisted of a circle with a twenty-five mile radius around that farm. Under this definition, of course, there could not be two farms that were in the identical relevant geographic market.

[5] In addition to the Oaklawn Plantation, one of South Coast's sister corporations owned a farm in south Louisiana. The Fifth Circuit also noted that what was properly characterized as sugar cane land was, of course, a direct function of the profitability of sugar cane farming. When the profitability of sugar cane farming increased, more land became "available" for sugar cane.

concluded that there could be no substantial market power in the market for the alleged tying product (sugar cane land) as a matter of law.

In *Jefferson Parish*, this Court held that a 30% share of the market for the tying product was insufficient, as a matter of law, to provide a predicate for a *per se* violation of the Sherman Act. So here the Fifth Circuit concluded that South Coast did not possess substantial market power in the market for the tying product and, as a matter of law, there could be no *per se* violation of the Sherman Act.

B. There Was No Record Evidence To Support A Conclusion Of An Unreasonable Restraint Of Trade.

Having concluded that there was no *per se* violation of the Sherman Act, the Fifth Circuit turned to the trial court's conclusion that the record evidence supported a determination that there had been an unreasonable restraint of trade. While the Fifth Circuit carefully examined the record and concluded that there was no evidence to support such a finding, arguably this record analysis was not even necessary.

(i) In The Absence Of Substantial Market Power In the Market For the Tying Product, There is No Basis For Finding An Unreasonable Restraint Of Trade.

Justice O'Connor's concurring opinion for four members of this Court in *Jefferson Parish* concludes that the

absence of substantial market power in the market for the tying product is the end of the inquiry in any attack on a tying arrangement. Since the concern with tying is only with respect to the unwarranted extension of substantial market power from one market to another, the concurring opinion reasoned that in the absence of substantial market power in the market for the tying product, the antitrust laws have no concern with a tying arrangement. Noted commentators and several courts agree.[6] This Court's more recent decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072, 2080 (1992), does not address this question, but it does characterize appreciable economic power in the tying market as a "necessary feature" of any illegal tying arrangement.

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[6] *See Jack Walters & Sons v. Morton Building, Inc.*, 737 F.2d 698, 702 (7th Cir.) ("This means among other things that the plaintiff must show that the defendant has market power . . . , as this is a prerequisite to being able to restrain trade unreasonably. . . . *[Jefferson Parish]* requires the plaintiff to make a similar, maybe identical showing in order to prove that a tying arrangement is unlawful, even though tying is still referred to as a *per se* offense."), *cert. denied*, 469 U.S. 1018 (1984). The Seventh Circuit subsequently held that in the absence of a showing of market power in the market for the tying product a defendant is entitled to summary judgment on a tying claim. *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 537-38 (7th Cir. 1986). The Eleventh Circuit agrees. *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1503 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986). Evidently, so does the Sixth Circuit. *Hand v. Central Transport Inc.*, 779 F.2d 8, 11 (6th Cir. 1985) (per curiam) ("A defendant must have market power before its conduct can be shown to have an adverse effect on competition."). *See also* Kevin J. Arquit, *Market Power in Vertical Cases*, 60 ABA Antitrust L.J. 921, 932 (1992).

(ii) There Was No Evidence That South Coast Had Any Power To Raise Prices In The Market For The Tied Product Nor Evidence Of Any Other Adverse Impact On Competition.

The majority opinion in *Jefferson Parish*, however, found it unnecessary to reach the question whether, in the absence of substantial power in the market for the tying product, there can be an unreasonable restraint of trade. The majority opinion concluded that the record should be analyzed to determine if, in the absence of substantial power in the market for the tying product, the tie had any adverse impact on competition in the market for the tied product. 466 U.S. at 31.

Following the direction of the *Jefferson Parish* majority, the Fifth Circuit in this case analyzed the trial court's finding that the restraint was "unreasonable" by focusing directly on the market for the allegedly tied product (milling services). There, the record indicated that vigorous competition was present. Indeed, the genesis of the transaction in issue here was an effort on the part of South Coast to compete with two local cooperatives owned by farmers groups which required the members of the co-op to mill their sugar cane at the cooperative mill or pay substantial penalties to the co-op for not doing so. In an effort to meet this competitive threat, South Coast had taken additional economic risks (by providing the landowner with a guaranteed return on his investment)

in order to obtain sugar cane for use at its mills.[7] There was no evidence that South Coast had any power to raise prices or otherwise adversely impact competition in any sugar cane milling market. Indeed, vigorous competition in the market for sugar cane milling services continued.

Petitioners' arguments to the courts below were, and its petition here is, an emotional appeal based on the assumption that the farmers had an absolute right to lease the land they wanted on exactly the terms they wanted, and that, in any event, they should have an absolute right to determine where the sugar cane grown on South Coast's land was milled. Since they did not get

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[7] The lack of antitrust significance in this particular case was highlighted by the fact that this Court's essential concern with tying arrangements has consistently been that a party not use significant market power that it enjoys in the market for the tying product to unfairly extend that power into the market for the tied product. *E.g., Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072, 2080 (1992) ("Having found sufficient evidence of a tying arrangement, we consider the other necessary feature of an illegal tying arrangement: appreciable economic power in the tying market."). Yet here it was uncontroverted that South Coast had acquired the land in question in order to promote the business of its sugar cane mills, which were facing stiff competition from other mills, particularly local cooperatives which had entered into long-term contracts that guaranteed them a source of cane for their mills. In other words, far from leveraging a strong market position in the tying product to acquire power in the tied market, South Coast had first acquired land in the tying market in an effort to compete in the tied market. This is the opposite situation from that with which this Court has expressed concern; i.e., one in which the defendant already enjoys "substantial market power" in the market for the tying product and attempts to use that power to disrupt competition in the market for the tied product.

exactly what they demanded, they claimed "competition" was injured. The fallacy in this argument, of course, is that the agreement only allocates the selection of the mill to South Coast. It does not eliminate any buyer from the market for mill services; it merely designates which of the two crop owners will make the selection. There was no evidence that even suggested that this allocation had any impact on prices in the market for milling services.

C. The Decisions Cited By Petitioners Do Not Establish That This Case Presents Questions Of Law Not Resolved By This Court.

In their attack on the Fifth Circuit's opinion, Petitioners cite several pre-*Jefferson Parish* circuit court opinions and earlier opinions of this Court and claim that the Fifth Circuit decision in this case is inconsistent with those decisions. These arguments were presented to the Fifth Circuit and rejected. The Fifth Circuit's opinion correctly distinguished these cited cases on their facts. 21 F.3d at 87-88; Pet. App. at 8-11. Moreover, this Court's decision in *Jefferson Parish* resolved questions left open by earlier decisions about what constitutes sufficient market power in the market for the tying product for *per se* analysis.

For example, *Northern Pacific Railway v. United States*, 356 U.S. 1 (1957), involved a tying claim predicated on the railroad's control of forty million acres of western land. This Court's decision does not reveal what market characteristics of those vast tracts of land located in "checker board fashion" gave the railroad sufficient market power to provide the predicate for a *per se* violation.

Whether or not Northern Pacific's share of the market for the tying product would have been sufficient to meet the standards later prescribed in *Jefferson Parish*, it is clear from the opinion that the mere fact that land was involved in that case does not mean that the owner of every farm who wants to contract with someone to farm the land for a share of the crop enjoys "substantial market power" in the market for farmland as Petitioners urge, or that markets involving "land" are to be analyzed differently than other markets. As this Court later noted, *Northern Pacific* should not be read to make proof of market power irrelevant. *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 620 n.13 (1977). Petitioners' argument here is that it should.[8]

The Fifth Circuit also correctly distinguished the pre-*Jefferson Parish* cases upon which Petitioners rely in an attempt to find a split in circuit opinion. In *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980), the issue of how much market power the defendant had to possess for a *per se* tying violation was not even addressed. In *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123 (6th Cir. 1981), the defendant was found to have sufficient power in the market for airport space, the tying market, for a *per se* violation because it was a dominant firm in a uniquely advantageous position. By contrast, there was no showing in this case that South Coast held a dominant position

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[8] Indeed, the trial court appeared to reject this argument. 792 F. Supp. at 1445; Pet. App. at 33-34. *See also Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n*, 938 F.2d 846, 851 (8th Cir. 1991) ("the mere fact that the tying product is real estate does not convey market power").

in the sugar cane land market or that its land conferred a market advantage not possessed by its competitors.

The other cases Petitioners cite are similarly distinguishable. *See Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130 (8th Cir. 1981) (defendants not only tied the purchase of one good to another, but conspired to adopt a uniform tying arrangement in the industry as well), *cert. denied*, 457 U.S. 1111 (1982); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207 (9th Cir. 1977) (defendant controlled 78% of the tying product).

Indeed, the notion that South Coast's control of two farms in two south Louisiana parishes established its substantial market power is based on nothing more than Petitioners' intransigent insistence that they were entitled to lease Respondents' land on the terms they wanted and since they were unable to do so South Coast had substantial market power. There is no authority for that proposition. The Fifth Circuit's conclusion that this record does not support a finding of an unreasonable restraint of trade is clearly correct.

II.

IN ANY EVENT, THE BUSINESS TRANSACTION AT ISSUE IN THIS CASE WAS NOT PROPERLY CHARACTERIZED AS A TYING ARRANGEMENT AND HAD NO ANTITRUST SIGNIFICANCE

The Fifth Circuit's opinion held that it was unnecessary to decide whether there were actually two products involved here that could be subject to a tie since, reasoned the Court, "assuming that they do . . . , [Petitioners] have nevertheless failed to establish that the

lease violated the Sherman Act." 21 F.3d at 85-86; Pet. App. at 4-5. Fundamentally, however, the business transaction in question here was not a tying arrangement at all.

South Coast was, of course, free to farm Oaklawn Plantation itself and send the cane to be milled where it wished. Its decision to do that would have had no antitrust significance. Likewise, South Coast was free to employ someone to perform farming services pursuant to its direction, and that arrangement would have raised no antitrust concerns. On the other hand, if South Coast sold its interest in the land and required as a condition of the sale that sugar cane be grown on the land and that the sugar cane be milled at its mills, the arrangement would call for antitrust analysis. The transaction at issue here was much more analogous to the former than to the latter.

The contract offered to Petitioners, captioned "Agricultural Agreement and Sublease," contemplated that each Petitioner would provide capital and labor and in return receive an 80% share of the crop. For providing the land, South Coast would receive a 20% share of the crop. The contract provided exactly what the farmer was to do with the land, i.e., grow sugar cane, and how the sugar cane was to be divided between the two parties. The contract reserved to one of the joint owners of the cane the right to designate the mill at which it would be processed. As South Coast urged to the trial court and again to the Fifth Circuit, such a contractual right between two co-owners of a product allocating responsibility for its handling to one of them is not a "tying arrangement." The relief Petitioners sought was simply

that they – rather than South Coast – should be allowed to designate where the jointly owned cane would be milled. There is no substantive difference between giving Petitioners, as opposed to South Coast, this right. Of course, Petitioners would not say that the allocation of this right to them would be a "tying arrangement." Neither is it a tying arrangement when the right is allocated to the other producer and co-owner of the cane – South Coast.

Petitioners' tying claim is predicated on the fact that the document giving them their rights is characterized as a "lease" of the land. Perhaps for purposes of insurance and other business operating expenses it is desirable to characterize the document as a lease, but the economic reality is that it is a sharecropping agreement. If the document had the words "Sharecropping Agreement" at the top and omitted a property description, there would be no change in the economic substance of the arrangement South Coast offered to Petitioners, but it would not have the patina of the tying claim Petitioners have pursued.

In other contexts, this Court has looked to the economic substance of the transaction involved, not how the parties characterized it. For example, in *United States v. Sealy, Inc.*, 388 U.S. 350, 352-53 (1967), the parties characterized their contractual arrangement as a vertical grant of a trademark license. Looking to the joint ownership of the grantor by the grantees, however, this Court held that the transaction should be viewed as a horizontal agreement among competitors. This Court explained, "We seek the central substance of the situation, not its periphery; and in this pursuit, we are moved by the identity of the persons who act rather than the label of their hats." The circuit

courts have subsequently analyzed other transactions by their central substance, rather than what the parties call them, when determining whether transactions raise any antitrust concerns. *See, e.g., Hardwick v. Nu-Way Oil Co.*, 589 F.2d 806 (5th Cir.) (gasoline distributor's contract with its consignee not to be analyzed as a consignment agreement where, under the facts of the case, the consignee was clearly an employee of the defendant; therefore, the agreement was of no antitrust significance), *cert. denied*, 444 U.S. 836 (1979); *Souza v. Estate of Bishop*, 821 F.2d 1332, 1336 (9th Cir. 1987) (requirement that lessee also lease a house in order to obtain the land on which the house was situated not a tie, since the substance of the transaction was the lease of only one property despite the provisions of the contract referring to them individually); *McGee v. First Fed. Sav. & Loan Ass'n*, 761 F.2d 647, 648 (11th Cir.) (lender's requirement that borrower purchase an appraisal from a designated appraiser in order to obtain a loan not a tie of the appraisal to the loan because both the lender and the borrower had an interest in the value of the security), *cert. denied*, 474 U.S. 905 (1985).[9]

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[9] Moreover, several cases hold that a bundling of goods when the seller has an interest in product quality does not amount to a tying agreement of interest under the antitrust laws. *See, e.g., Smith v. Mobil Oil Corp.*, 667 F. Supp. 1314 (W.D. Mo. 1987) (holding that the Mobil trademark and Mobil gas were the same product – Mobil-branded gasoline); *Principe v. McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980) (holding that a lease, franchise agreement, and security deposit were all parts of one product – the franchise), *cert. denied*, 451 U.S. 970 (1981); *KFC Corp. v. Marion-Kay Co.*, 620 F. Supp. 1160, 1166 (S.D. Ind. 1985) (holding that the KFC trademark and the KFC seasoning were not separate products).

Here, the substance of the transaction was a share-cropping arrangement between Petitioners and South Coast. Between the two, it was necessary that one be allocated the right to choose a mill to process their jointly owned product. This contractual allocation of a right to choose a mill for processing the jointly owned cane presents no threat to competition. The implication of declaring that it does is that any other contract permitting one of several joint owners to select goods or services pertaining to the joint enterprise would have to be analyzed as a tying arrangement. To do so makes no more economic sense than to declare that a pencil constitutes a tying of the sale of lead to an eraser. In substance, this case presented no issue of antitrust significance and the motion to dismiss the plaintiffs' claims on that basis should have been granted by the trial court in the first instance.

CONCLUSION

Under the facts as found by the trial court, Petitioners were not entitled to the legal relief they were awarded by the district court. The allegations and the evidence were carefully analyzed by the Fifth Circuit and properly resolved under this Court's precedent. There is

no issue in this case that warrants review of the Fifth Circuit decision by this Court.

Respectfully submitted,

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